

A **ONG SOO KAN & ORS v. ONG SOO KWEE & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR

JOHAN LEE KIEN HOW JC

[SUIT NO: WA-22NCvC-542-08-2021]

13 MARCH 2023

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Abstract – *The executor and trustee of a will, who initiated legal proceedings seeking certain assets to be distributed to his possession, had breached his fiduciary duties as an executor and co-trustee of the estate of the deceased. Such breach amounted to sufficient cause under s. 34 of the Probate and Administration Act 1959 for the revocation of the grant of probate.*

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SUCCESSION: *Probate – Will – Distribution of estate – Executor and trustee of will sought certain assets to be distributed to his possession – Whether executor breached his fiduciary duties by initiating legal proceedings – Whether there was conflict of interest – Whether amounted to sufficient cause for revocation of grant of probate – Probate and Administration Act 1959, s. 34*

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On 25 March 2001, the deceased passed away and left a will ('will'). In the will, it was mentioned two of the deceased's sons were appointed as executors and trustees of the will *ie*, the first defendant and the late Ong Soo Keok. A grant of probate was issued. The beneficiaries of the deceased were the first to fifth plaintiffs, the first defendant and Ong Soo Keok. Essentially, it was understood that any real and movable properties, investments and monies were to be distributed equally among the beneficiaries. Consequently, the issues that arose in the current case were related to cls. 8 and 9 of the will which stated that all real and movable properties, investments and monies should only be distributed 20 years from the time of the death of the deceased or the death of the first plaintiff, whichever was earlier. The 20 years period expired on 20 March 2021. However, on 5 April 2021, the first defendant filed Suit 673 by way of originating summons (later converted to a writ) against Ong Soo Keok and Ong Ghee Soon, the trustees of the estate. In Suit 673, the first defendant sought that certain assets be distributed to his possession. Dissatisfied, the plaintiffs made an application ('application') pursuant to O. 14A of the Rules of Court 2012 ('ROC'), whereby the plaintiffs sought to determine the following legal questions and dispose of this case ('action') summarily: (i) whether the first defendant had breached his fiduciary duties as an executor and co-trustee of the estate of the deceased when the first defendant initiated legal proceedings against Ong Soo Keok (as executor and trustee of the estate) and against Oh Ghee Soon (as trustee of the estate) (question 1); and (ii) whether a breach of

fiduciary duties by the defendant amounted to sufficient cause under s. 34 of the Probate and Administration Act 1959 ('Probate Act') for the revocation of the grant of probate ('question 2').

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Held (entering judgment against first defendant):

(1) By virtue of this O. 14A, the court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings. The questions posed by the plaintiffs were questions of law which were sufficient to determine the conclusion of the whole case. (paras 16 & 19)

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(2) From the moment the first defendant sued the estate, there was a conflict of interest. This was because in doing so, the first defendant would wear two hats *ie* as the claimant against the estate, and the executor and trustee for the estate. He was essentially testifying against and on behalf of the estate at the same time. Since the first defendant was also the co-executor of the estate, the filing of Suit 673 had, in itself, put him in an awkward position. His co-executor had since passed on and he was the only executor left. Under this tricky position, for the purpose of Suit 673, he had to give affidavit, testimony, or statements, for and against the estate. On the one hand, he had to defend the estate, on the other hand, he had to pursue his claim against the estate. How could this not tantamount to a conflict of interest or potential conflict of interest? The answer to the first question was therefore in the affirmative. (paras 26 & 31)

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(3) Section 34 of the Probate Act gives the court the discretionary power to revoke or amend any probate and letter of administration, provided that there is sufficient case for the court to do so. The burden of proof in determining whether there was a 'sufficient cause' lay on the applicant *ie* in this case, the plaintiffs. It was the plaintiffs' submission that the welfare and interests of the beneficiaries of the estate were one of the key elements that the courts need to consider in determining 'sufficient cause'. If the welfare and interest of the beneficiaries were threatened, the courts need to interfere by revoking the probate or letters of administration. Herein, the first defendant was in a position of conflict of interest with his role as an executor of the estate when he filed Suit 673. The fact that he had chosen to initiate Suit 673 for his personal claim surely showed that it was against the estate. There was indeed a conflict of interest and conflict of interest was a sufficient cause for the court to revoke the probate as demanded by s. 34 of the Probate Act. Thus, the second question was also answered in the affirmative. Judgment was hereby entered against the first defendant. (paras 33, 34, 36, 37, 42 & 53)

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A Case(s) referred to:

Attorney General v. Blake (Jonathan Cape Ltd Third Party) [2001] 1 AC 268 (*refd*)
Damaharta Managers Sdn Bhd v. Melewar Leisure Sdn Bhd & Ors [2008] 1 LNS 200 HC (*refd*)

Datuk Kim Kok Khin v. Tan Ah Tong [2014] 4 CLJ 936 CA (*refd*)

Deloitte & Touche AG v. Johson [2000] Vol 1 BCLC 485 (*refd*)

B *Guindarajoo Vegadason v. Satgunasingam Balasingam* [2010] 6 CLJ 954 HC (*refd*)

Heath v. Heath [2018] EWHC 779 (*refd*)

Jigarlal Kantilal Doshi v. Amanah Raya Bhd [2011] 9 CLJ 361 FC (*dist*)

Lakshmi Prataprai Bhojwani (Alias Mrs Lakshmi Jenthanad Bhojwani) v. Moti Harkishindas Bhojwani [2019] 3 SLR 356 (*refd*)

C *Ligar Fernandez v. Eric Claude Cooke* [2002] 6 CLJ 152 HC (*refd*)

Ong Eng Hock & Anor v. Ong Cheng Guan & Anor [2018] 7 CLJ 154 FC (*refd*)

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA (*refd*)

Rachael Mei Ling Ong & Anor v. Dato' Bruno Henry Almeida [1998] 3 CLJ 71 HC (*dist*)

Re Adrian Fleming Estate [2006] NLTD 112 (*refd*)

D *Re Khoo Boo Gong, (Decd) Khoo Teng Seong v. Teoh Chooi Ghim & Ors* [1981] 1 LNS 78 FC (*refd*)

RM P RM P v. Palaniyappan [1976] 1 LNS 137 HC (*refd*)

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [2009] 1 LNS 1030 HC (*refd*)

Tan Kah Fatt & Anor v. Tan Ying & Another Appeal [2021] 1 LNS 264 CA (*refd*)

Thomson, Re Thomson v. Allen [1930] 1 Ch 203 (*refd*)

E Legislation referred to:

Probate and Administration Act 1959, ss. 12, 34

Rules of Court 2012, O. 14A

Rules of the High Court 1980, O. 71 r. 37

For the plaintiffs - Ranjit Singh, Elizabeth Lau, & Hazel Siau; M/s Elizabeth Lau

F *For the 1st defendant - Jerry Ling; M/s Lee, Ling & Partners*

For the 2nd defendant - Daniel Albert & Nicholas Yap; M/s Daniel & Wong

Reported by Suhainah Wahiduddin

JUDGMENT

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Johan Lee Kien How JC:

Introduction

H [1] This is the plaintiffs' application ("the application") pursuant to O. 14A of the Rules of Court 2012, whereby the plaintiffs are seeking to determine the following legal questions ("the questions") and dispose of this case ("this action") summarily:

Question 1:

I Whether the first defendant (previously the defendant) has breached his fiduciary duties as an executor and co-trustee of the estate of Loh Ah Moy @ Loh Siew Keng ("the estate") when the first defendant initiated legal proceedings *vide* Kuala Lumpur High Court Originating Summons

No. WA-24NCvC-673-04/2021 (“Suit 673”) against Ong Soo Keok (as executor and trustee of the estate) and against Oh Ghee Soon (as trustee of the estate)?

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Question 2:

Whether a breach of fiduciary duties by the defendant amounts to sufficient cause under s. 34 of the Probate and Administration Act 1959 for the revocation of the grant of probate dated 28.11.2001 issued on 11.12.2001?

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Facts

[2] On 25 March 2001, Loh Ah Moy @ Loh Siew Keng passed away (“the deceased”) and left a will (“the will”). In the will, it was mentioned that two of the deceased’s sons were appointed as executors and trustees of the will, *ie*, the first defendant and the late Ong Soo Keok. A grant of probate was issued on 11 December 2001.

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[3] The beneficiaries of the deceased were the first to fifth plaintiffs, the first defendant and Ong Soo Keok. Essentially, it was understood that any real and movable properties, investments, and monies were to be distributed equally amongst the beneficiary. This is eluded in cl. 2 of the will:

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Except for paragraph five (5) hereof I Give Devise and Bequeath all my real and movable properties, investments and monies wherever situated of one (1) share each to each of my four sons, Ong Soo Kan, Ong Soo Keok, Ong Soo Kit, Ong Soo Kwee and one (1) share to my late daughter, Ong Paik Joo’s (deceased) three sons Peter Khong, Paul Khong and Khong Kok Yau in equal shares

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[4] Consequently, the issues that arise in the current case are related to cls. 8 and 9 of the will. Clauses 8 and 9 of the will says:

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Clause 8:

The rental income from my properties, dividend and returns from my investments shall be distributed every quarterly as follows:

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Names	Shares
Ong Soo Kwee	2/6
Ong Soo Kan	1/6
Ong Soo Keok	1/6
Ong Soo Kit	1/6
Peter Khong	1/18
Paul Khong	1/8
Khong Kok Yau	1/8

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A Clause 9:

I direct that the said arrangement under paragraph eight (8) shall continue for the next twenty (20) years from the time of any death or until the death of my son Ong Soo Kwee, whichever is earlier my said Executors and Trustee shall then distribute my real and movable properties, investments and monies in the proportions is stated in paragraph two (2) and three (3) as stipulated aforesaid.

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[5] Following cls. 8 and 9 above, all real and movable properties, investments and monies should only be distributed 20 years from the time of the death of the deceased or the death of the first plaintiff, whichever is earlier. The 20 years period expired on 25 March 2021.

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[6] However, on 5 April 2021, the first defendant filed Suit 673 by way of originating summons (later converted to a writ) against Ong Soo Keok and Ong Ghee Soon (the trustees of the estate). In Suit 673, the first defendant sought that the following be distributed to his possession:

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(i) Peti Simpanan No. C416 (HSBC Bank Malaysia Berhad) & Peti Simpanan No. 3339 dan 4527 (HSBC Bank Malaysia Berhad) dan kemudian itu untuk disimpan di Public Bank Berhad (Menara PBB, Jalan Ampang) (Semua dalam Nama Bersama di antara Loh Ah Moy dan Ong Soo Kwee)

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Semua hartabenda peribadi (“personal chattels”) kepunyaan Loh Ah Moy @ Loh Siew Keng, simati dialih kepada Plaintiff secara orang yang masih hidup (“survivorship”) untuk Peti-Peti Simpanan Bersama tersebut.

(ii) Peti Simpanan No. 225 (Citibank Berhad) (dulu di OCBC Bank Malaysia Berhad dalam Peti Simpanan Bersama No. 987LA dengan Ong Soo Kan)

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Semua harta benda peribadi (“personal chattels”) kepunyaan Loh Ah Moy @ Loh Siew Keng, si mati secara wasiat spesifik kepada plaintiff seperti yang dinyatakan dalam Nota “Everything in this box belongs to Soo Kwee dated 29.12.1989. Signed Loh Ah Moy.

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(iii) Peti Simpanan No. 224 (Citibank Berhad) dulu di OCBC Bank Malaysia Berhad dalam Peti Simpanan No. K1283B dalam nama tunggal Loh Ah Moy)

Semua harta benda peribadi (“personal chattels”) kepunyaan Loh Ah Moy @ Loh Siew Keng, si mati:

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(a) Atas wasiat spesifik kepada Plaintiff seperti yang dinyatakan dalam Nota “Everything in this box belongs to Soo Kwee dated 29.12.1989. Signed Loh Ah Moy.”

(b) Alternatifnya, atas Perintah Tindakan 2005 bertartikh 9.2.2007 dan Perintah Tindakan 2011 bertartikh 13.02.2012.

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(Collectively, “the Assets”)

[7] Dissatisfied with the first defendant, the plaintiffs initiated this action against the first defendant. By an order of this court, the second defendant was later added into this action as a co-defendant. The plaintiffs then filed the application. In the application, the plaintiffs sought that in the event the answers to question 1 and question 2 are in the affirmative, this court shall make the following orders:

- (i) an order that the grant of probate dated 28 November 2001 issued by the Kuala Lumpur High Court on 11 December 2001 *vide* Petition No. S3-32-535 of 2001 be revoked;
- (ii) an order that Ong Soo Kwee be removed forthwith as an executor and co-trustee of the estate; and
- (iii) consequential reliefs.

The Plaintiffs' Case

[8] In respect to the first question, the plaintiffs submitted that the first defendant had breached his fiduciary duty as an executor of the will when he put himself in a possible conflict between his personal interest and the interest of the beneficiaries. The plaintiffs argued that it was clear from the will that all of the deceased's real and movable properties, investments and monies shall be distributed amongst the beneficiaries after the lapse of 20 years.

[9] In continuation, the plaintiffs further premised that the first defendant knew that the assets were also part of the estate which must be distributed and/or divided amongst the beneficiaries.

[10] On the second question, the plaintiffs contended that "possible conflict of interest" as pleaded by the plaintiffs constituted "any sufficient cause" under s. 34 of the Probate and Administration Act 1959. To this, the plaintiffs had quoted several cases to support their contention.

[11] The application and the submission of the plaintiffs were duly supported by the second defendant. Counsel for the second defendant had also added some additional cases to further support the application.

The First Defendant's Case

[12] On the other hand, to refute the application, the first defendant argued that the first question was premature. The first defendant grounded his claim by submitting that for this court to determine whether there was a conflict of interest, this court need to see amongst others whether,

- (i) the first defendant has a valid claim in Suit 673;
- (ii) the first defendant owes fiduciary duties and/or obligation to the plaintiffs in respect to the assets; and

- A (iii) the Court of Appeal *ex-tempore* judgment that there was no conflict of interest by the first defendant just because the first defendant was an executor and beneficiary of the deceased's estate would estop this action.

B [13] Secondly, the first defendant also contended that his claim in Suit 673 is based on the law of gifts, not probate and administration. This is because, there were notes in the safe box deposits stating that "everything in this box belongs to Soo Kwee dated 29 December 1989. Signed Loh Ah Moy". Moreover, the plaintiffs also cannot debunk that the purported notes were forged or fraudulently made by the first defendant.

C [14] Thirdly, the first defendant premised that the filing of Suit 673 does not amount to breach of fiduciary obligation. Even if such conflict of interests could be considered as a sufficient cause, this court would still need to determine whether the first defendant has fiduciary duties to the beneficiaries concerning the assets.

D **Findings And Decision Of This Court**

[15] After appraising the facts adduced by both parties through affidavits and exhibits, and having considered the submissions by learned counsels for both sides, I find that the application has merits. My decision is based on the following findings.

E *Principles Of Order 14A Of Rules Of Court 2012*

F [16] Order 14A applications allow for cases to be heard and finalised expeditiously without the need for a trial. By virtue of this O. 14A, the court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings. Hence, the costs and expenses incurred on the case would be reduced and it could save lots of judicial times (see *Datuk Kim Kok Khin v. Tan Ah Tong* [2014] 4 CLJ 936; [2014] 6 MLJ 747).

G [17] In *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8, His Lordship Mohd Noor Ahmad JCA had laid down the principle on 14A (at p. 351 (CLJ); p. 19, para. [12] (MLJ)):

H In a nutshell, the order *enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein*. The order is new to our civil procedure and hence, the few local decisions of the High Court on the ambit of O. 14A are not instructive. For that reason, we are inclined to refer to foreign cases decided on the equivalent of our O. 14A. In *Korso Finance Establishment Anstlat v John Wedge* (unreported, February 15, 1994 (CA) Transcript No. 14/387), the English Court of Appeal laid down the following principles on the ambit of O. 14A:

- (1) *An issue is 'a dispute point of fact or law relied on by way of claim or defence.'* A
- (2) *A question of construction is well capable of constituting an issue.*
- (3) *If a question of construction will finally determine whether an important issue is suitable for determination under O. 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.* B
- (4) *Respondents to an application under O. 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might rum up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances, of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made, in the absence of such evidence the court should not refrain from dealing with the application (see The Supreme Court Practice 1999 Vol 1 para 14A/2/5). (emphasis added)* C

[18] Also in *Danaharta Managers Sdn Bhd v. Melewar Leisure Sdn Bhd & Ors* [2008] 1 LNS 200; [2008] 4 MLJ 448, Her Ladyship Rohana Yusof J (as she then was) observed that the court will, in O. 14A application, determine the issues of law upon the construction of documents whenever it appears to the court that the determination of any question of law will lead to a final conclusion of the action because there are no facts in dispute. D

[19] In our present case, I find that the questions posed by the plaintiffs in the application are questions of law which are sufficient to determine the conclusion of the whole case. There is also no fact in dispute. What is needed is to determine the correct interpretation and application of the laws concerning the application through the answers to the questions mooted. I shall discuss the questions separately below. E

Whether There Is A Breach Of Fiduciary Duties F

[20] To begin with, in resisting this action, the first defendant had argued that the Court of Appeal in granting the *ex-tempore* order in 2012 ("the 2012 order") had also held that there was no conflict of interest. However, a detail reading of the 2012 order would clearly show that this is misplaced. Firstly, that order was issued in 2012 when Suit 673 had not been filed. The filing of Suit 673 in 2021 has now made the circumstance of this action distinctively different from all the earlier cases. Besides, the 2012 order was focusing on the executor – beneficiary relationship where para. 5.3(iii)(c) of the 2012 order (as pleaded by the first defendant in his defence) has stated that, "any executor/beneficiary relationship is no reason to say that there was a conflict of interest". This action, on the other hand, is concerning the first defendant's personal claim against the estate over the ownership of the asset notwithstanding his position as an executor of the estate. Therefore, there is nothing in the 2012 order to suggest that there is no conflict of interest when the first defendant filed Suit 673 against the estate. In answering the first question, this court must now determine whether there is indeed a breach of fiduciary duties and conflict of interest. G

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- A [21] For the first question, the plaintiffs submitted that since the first defendant was also the executor of the estate, his action in initiating Suit 673 created a possible conflict of interest. Since he is claiming the assets for himself in Suit 673, his personal interest and the interest of the beneficiaries would be in skirmish. To support, the plaintiffs cited the cases of *Lakshmi Prataprai Bhojwani (alias Mrs Lakshmi Jenthanad Bhojwani) v. Moti Harkishindas Bhojwani* [2019] 3 SLR 356; and *Thomson, Re Thomson v. Allen* [1930] 1 Ch 203) to show that the first defendant ought to act in the best interest of the beneficiaries and not put himself in a position where his personal interest conflicts or would possibly conflict with the interest of the beneficiaries.
- C [22] The plaintiffs further argued that it was quite clear that the assets were indeed part of the estate because the assets were listed and included in the list of assets and liabilities of the deceased in the grant of probate dated 28 November 2001.
- D [23] Therefore, it was the plaintiffs' submission that such personal claim as initiated by the first defendant in Suit 673 had put him in a position of conflict of interest between his personal interest and the interest of the beneficiaries of the estate. Here, the plaintiffs also cited the cases of *Heath v. Heath* [2018] EWHC 779 and *Tan Kah Fatt & Anor v. Tan Ying & Another Appeal* [2021] 1 LNS 264; [2021] MLJU 284.
- E [24] On the other hand, the first defendant argued that his personal claim in Suit 673 did not amount to any breach of fiduciary duties. Firstly, he submitted that he is within his right as one of the beneficiaries of the said estate to claim the assets. Secondly, the first defendant premised that the assets were a gift to him as stated in the purported note in the safe deposit boxes (to which the plaintiffs claimed otherwise).
- F [25] Moreover, in an Originating Summons No: 25-24-2019-2005 ("OS 2005"), the court had already dismissed the beneficiaries' claims that the assets were residuary assets on trust. Mindfully, this action was not appealed by the plaintiffs. Thus, it is the first defendant's contention that the distribution of the assets to him is not based on probate and administration law but on the law of gifts. The first defendant based his claim in Suit 673 on the purported note. Hence, the fiduciary duties submitted by the plaintiffs is misplaced since fiduciary duties do not extend to gift.
- G [26] Taking into consideration the litigants' submission, I am agreeable with the plaintiffs. Firstly, it is obvious that from the moment the first defendant sued the estate there is a conflict of interest. This is because in doing so, the first defendant would wear two hats, *ie*, as the claimant against the estate, and the executor and trustee for the estate. He is essentially
- I testifying against and on behalf of the estate at the same time.

[27] Her Ladyship Nallini Pathmanathan JC (as she then was) in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [2009] 1 LNS 1030; [2010] 1 MLJ 547 quoted the following description of ‘conflict of interest’ by Lord Millett in *Deloitte & Touche AG v. Johson* [2000] Vol 1 BCLC 485:

... Their Lordships observe that the expression ‘conflict of interest’ is an abbreviation for ‘conflict of interest and duty’. The rule is that *a fiduciary may not without the informed consent of his principal place himself in a position where his interest may conflict with his duty to the principal. The danger is that his interest may affect him in the discharge of his duty to the prejudice of his principal.* (emphasis added)

[28] Likewise in *Attorney General v. Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 at 280, the House of Lords explained that under the principle of ‘breach of trust and fiduciary duty’ the trustee and fiduciaries may not put themselves in a position where their duty and interest conflict. To this end, they must not make any unauthorised profit. If they do, they are accountable. Whether the beneficiaries or persons to whom the fiduciary duty is owed suffered any loss by the impugned transaction is altogether irrelevant.

[29] The plaintiffs’ counsel also quoted the English case of *Heath v. Heath* [2018] EWHC 779, where Carr J allowed the removal of one Timothy from his position as an executor on the basis that there was a possibility of conflict of interest. In that case, the court found that the claim by Timothy was against the estate. Carr J in delivering his judgment observed the followings:

13. The much more difficult problem is that Timothy has made it clear that his position is that, given that he provided for several years of care for his mother and his brothers did not, he is entitled to greater share of the estate than the 1971 will provides. He has explained that he wishes to contend that there is implied contract or possibly a quantum meruit claim based on the propositions that: he ought to be recompensed; that his services to his mother should be recognised; that his claim requires quantification; and that that it is a debt which the estate ought to pay. *That gives rises to a conflict of interest between his duties as executor and his potential claim as a claimant against the estate.* Furthermore, Timothy’s position is that his mother recognised his greater contribution by making a second will which left 100% of the estate to him. If that is his position, then *I do not see that, as an executor, he can carry out the administration of will which gives equal shares to each of the beneficiaries.*

(emphasis added)

[30] Similarly, in the recent case of *Tan Kah Fatt & Anor v. Tan Ying & Another Appeal* [2021] 1 LNS 264; [2021] MLJU 284, the Court of Appeal upheld the decision of the learned trial judge to remove Tan Kah Fatt as the co-administrator of the estate. Lau Bee Lan JCA in delivering the judgment of the court held that Tan Kah Fatt had acted in conflict of interest as an administrator. Lau Bee Lan JCA at para. [67] premised that:

- A ... On this note, we are of the considered view that the submission of Counsel for Tan Kah Fatt that he had carried out his responsibility as an administrator in a proper, honest and diligent manner when he distributed the Insurance Monies whereby every beneficiary received RM1,497,000.00 and that the shares of the monies are kept for the interest of Tan Sin Lee and Tan Sin Yee (see para. 7 above) are acts of Tan Kah Fatt which is
- B negated when weighed against the fact that he had acted in conflict of interest of his duty as administrator; *on one hand he distributed the Insurance Monies but on the other hand, as a director of Y-Teq and YE Motorcycles (Plaintiffs in Suit 2), he took the position that the Insurance Policy was purchased for the benefit of the 2 companies* and as the learned JC correctly found he had given the
- C consent for the plaintiffs in Suit 2 to proceed against the estate of the deceased. (emphasis added)

- [31] Based on all of the above, it is my finding that there is a clear conflict of interest of the first defendant in initiating his claim in Case No 673. Since the first defendant is also the co-executor of the estate, the filing of Suit 673 has, in itself, put him in an awkward position. His co-executor has since
- D passed on and he is the only executor left. Under this tricky position, for the purpose of Suit 673, he has to give affidavit, testimony, or statements, for and against the estate. On one hand he has to defend the estate, on the other hand he has to pursue his claim against the estate. How can this not tantamount to a conflict or potential conflict of interest? Hence, I answer the
- E first question in the affirmative.

Whether A Conflict Of Interest constitutes 'Sufficient Cause' Under Section 34 Of The Probate and Administration Act 1959

- [32] Section 34 of the Probate and Administration Act 1959 says, "Any
- F probate or letters of administration may be revoked for sufficient cause".

- [33] The above provision gives the court the discretionary power to revoke or amend any probate and letter of administration, provided that there is sufficient cause for the court to do so. 'Sufficient cause' in this context, is an objective one (see *Guindarajoo Vegadason v. Satgunasingam Balasingam* [2010]
- G 6 CLJ 954; [2010] 4 MLJ 842).

- [34] The burden of proof in determining whether there is a "sufficient cause" lies on the applicant *ie*, in this case, the plaintiffs. In the Federal Court case of *Ong Eng Hock & Anor v. Ong Cheng Guan & Anor* [2018] 7 CLJ 154; [2018] 5 MLJ 701, His Lordship Jeffrey Tan FCJ held that the person who
- H seeks revocation of the probate or letters of administration has the burden to prove sufficient cause. His Lordship in delivering the judgment at p. 709 highlighted the decision by Abdul Hamid J in *RM P RM P v. Palaniyappan* [1976] 1 LNS 137; [1977] 2 MLJ 34:

- I Before I finally state my finding, it may be useful to refer to the law affecting application for revocation of probate. It is settled law that *the court may revoke any probate if it is satisfied that there is sufficient cause to do so (s. 34*

of the Ordinance). The onus, I think, is on the applicant to establish that there is sufficient cause of the revocation. What constitutes sufficient cause would, to my mind, depend upon the circumstances of each particular case.

(emphasis added)

[35] Hence, it is clear that the court may revoke the probate once the applicant has proved that there is indeed sufficient cause to do so.

[36] In the present case, it is the plaintiffs' submission that the welfare and interests of the beneficiaries of the estate are one of the key elements that the courts need to consider in determining "sufficient cause". If the welfare and interest of the beneficiaries are threatened, the courts need to interfere by revoking the probate or letters of administration. To support their contention, the plaintiffs quoted another Federal Court case of *Re Khoo Boo Gong, (Decd) Khoo Teng Seong v. Teoh Chooi Ghim & Ors* [1981] 1 LNS 78; [1981] 2 MLJ 68 where it was held at p. 69 that:

The power to revoke a grant of probate or letters of administration is vested in the High Court by s. 34 of the Probate & Administration Act, 1959 (Rev. 1972) and can be exercised for "any sufficient cause." However, there is no definition of what is sufficient cause. But, if in the words of Jeune, President, in *In the Goods of William Loveday* [1900] P 154, "the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto, "then **the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In our view, that is a strictly objective test.**

(emphasis added)

[37] In the present case, it is clear that there the first defendant is in a position of conflict of interest with his role as an executor of the estate when he filed Suit 673. The fact that he had chosen to initiate Suit 673 for his personal claim surely shows that it is against the estate. How could he perform his duty under cl. 9 of the will? To this, I find guidance in *Ligar Fernandez v. Eric Claude Cooke* [2002] 6 CLJ 152. In this case, the plaintiff had made an application to revoke the defendant's appointment as executor and trustee of the estate of the deceased. The plaintiff claimed that the defendant's involvement in the acts of transferring assets and shares of a company in which he is the director of the company, to himself and other selected beneficiaries constituted a "sufficient cause" under s. 34. His Lordship Abdull Hamid Embong J (as he then was) in his judgment observed that the test to determine a "sufficient cause" is an objective test. This means that it is enough for the plaintiff to adduce sufficient evidence to raise a strong suspicion of the defendant's inaction, want of diligence and honesty, or a conflict of interest situation or inability to act to invoke the court's jurisdiction under s. 34 of the Probate and Administration Act 1959.

- A [38] In our present case, the first defendant's counsel tried to argue that this issue cannot be decided at this juncture since the question whether the purported note is false is yet to be proven. However, it is my finding that the allegation of fraud with regards to the purported note is not an issue before me. It is the live issue in Suit 673.
- B [39] Nevertheless, as submitted by the plaintiffs, the first defendant by filing his personal claim towards the assets in which the assets is a part of the estate that he acts as the executor and trustee, has put himself in a conflict situation between his duty as an executor and his personal interest. Hence, regardless of whether the purported note is false or not, objectively the
- C plaintiffs have successfully raised a reasonable suspicion for this court to allow the revocation of the grant of probate. As stated by His Lordship Abdull Hamid Embong J in *Ligar Fernandez (supra)* at p. 183, paras C to D:
- ... The allegations for consideration are thus, a question of facts to be determined by this court on an objective test. **It is immaterial therefore if the allegations are actually believed or not; so long as it can be objectively determine that they raised a reasonable suspicion**, then, the plaintiff would have succeeded. (emphasis added)
- D [40] Counsel for the second defendant in supporting the plaintiff case has quoted a Canadian case. They premised that the fact of this case is almost
- E similar to our present case and thus must be considered by this court. In *Re Adrian Fleming Estate* [2006] NLTD 112, Amy Fleming (the applicant) had initiated an action against Isabelle Mary Fleming (the respondent) to remove her as administratrix of the estate of Adrian Fleming (the deceased). The applicant was one of the deceased's children in a previous marriage.
- F Prior to the deceased's demise, he held fishing licenses and operated a fishing enterprise. The deceased's fishing vessel crew consisted of himself, Keith Fleming (the deceased's brother) and one Adrian Kielly. After the deceased's passing, the enterprise was carried on by the respondent saying that it was on behalf of the estate. However, the applicant disagreed. At the same time,
- G Keith Fleming as representative of the estate of Joseph Michael Fleming (the deceased's father) had commenced an action against the deceased's estate claiming that the fishing licence was only being held by the deceased in trust for all of the sons of Joseph Michael Fleming, including Keith. In Keith Fleming's action, the respondent claimed that she has the right to receive half of the value of the licence and associated enterprise since she allegedly had
- H invested some of her own funds to keep the business going. In the end, the Supreme Court of Newfoundland and Labrador trial division allowed the applicant's claim to remove the respondent from continuing her duty as the administratrix of the deceased's estate.

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[41] Derek Green CJTD in removing the respondent from her position observed that there was such conflict of interest arose on part of the respondent. He observed that at para. [14] that:

[14] ... *A conflict of interest occurs whenever the personal interest of the personal representative conflicts with the interests of others for whom he or she has a duty to act. Clearly, whenever a person who is entitled to a share in an estate is appointed an administrator of that estate, there is possibility that he or she will act improperly to favour himself or herself over other beneficiaries. Yet, the rules of court expressly contemplate that such persons may serve and, indeed have a right of priority to appointment, as administrator. See, Rule 56.02. That fact alone, therefore, will often not be sufficient to constitute a conflict of interest justifying removal. Where, however, the nature of the personal interest of the administrator is such that he or she will inevitably, or even will likely, be placed in a conflict situation with respect to specific decisions involving the administrator not maintaining an even hand between beneficiaries or place him or her in a difficult situation with respect to maintaining impartiality, that will be enough. In Re Walter W. Shaw Co [1922] 3 W.W.R 119, MacDonald J said at p. 120 that "The question is whether it would be difficult for the trustee to act impartially, not whether, in fact, it would or would not do so."* (emphasis added)

[42] As mentioned earlier, conflict of interest was listed as one of the situations of 'sufficient cause' by the court in *Ligar Fernandez (supra)*. As far as I am concerned, the first defendant's action in filing Suit 673 in indeed a conflict of interest and conflict of interest is a sufficient cause for the court to revoke the probate as demanded by s. 34 of the Probate and Administration Act 1959. Thus, the second question is also answered in affirmative.

[43] Since both of these questions are answered in the affirmative, the application is allowed. There is no other issue left concerning this action. This court, thus, decide this action in favour of the plaintiff summarily. For the completeness of discussion, I shall now discuss briefly another issue concerning the relief sought by the plaintiffs.

Consequential Reliefs

[44] Essentially, the plaintiffs in the application had sought a relief to appoint a new executor to replace the first defendant. With due respect, I cannot grant this relief. This is because the appointment of an executor is solely based on the will of the deceased. When a person names an executor in his/her will, such executor, upon the demised of this person, would then apply for a grant of probate from the court to deal with the assets and liabilities of the deceased.

[45] If the deceased had named two executors in his will, the chain of representation may arise if one of the executors had passed away or in any way cannot attend to his duty as per s. 12 of the Probate and Administration Act 1959:

A Executor of executor represents original testator

12. (1) An executor of a sole or last surviving executor of a testator is the executor of that testator:

B [46] Likewise, in the present case, there were two executors named in the will, *ie*, the first defendant and the late Ong Soo Keok. By the order of this court to remove the first defendant from the executorship of the estate, supposedly, Ong Soo Keok would automatically be the sole executor. However, Ong Soo Keok had since passed away. The chain of executorship has ended with the removal of the first defendant as the executor. At this juncture, this court could only appoint, as prayed by the plaintiffs, an additional co-trustee for the estate, but not the executor. This court simply does not have any power to appoint an executor for the estate if he or she has never been named in the will.

D [47] During the clarification session, the plaintiffs' counsel argued that this court may appoint an administrator to administer the estate under the prayer "any further or other reliefs that the court thinks fit" although the same has never been specifically pleaded or prayed. To support, the plaintiffs' counsel cited the case of *Jigarlal Kantilal Doshi v. Amanah Raya Bhd* [2011] 9 CLJ 361 and *Rachael Mei Ling Ong & Anor v. Dato' Bruno Henry Almeida* [1998] 3 CLJ 71; [1998] 6 MLJ 258.

E [48] Unfortunately, I do not find that these two cases applicable to our present case. The issue in *Jigarlal Kantilal Doshi (supra)* was whether the Amanah Raya Berhad ('ARB') could petition for grant of probate under the Public Trust Corporation Act 1995 when it was only appointed as an administrator. The Court of Appeal held that the grant of probate applied by **F** ARB was actually a grant of letters of administration with a will annexed. However, the Federal Court overruled this and found that the application made by ARB was specifically for a grant of probate and not a grant of letters of administration with will annexed.

G [49] His Lordship Abdull Hamid Embong FCJ in delivering the judgment stressed that it is important to differentiate between an appointment of an administrator and a grant. In this case, the Court of Appeal on 4 June 1998 had appointed ARB as an administrator of the estate. Hence, the correct application was for a grant of administration and not a grant of probate. Thus, the Federal Court unanimously held that the grant of probate should be set aside and the matter be corrected pursuant to the procedures set out under **H** O. 71 r. 37 of the Rules of the High Court 1980 (now ROC 2012).

I [50] The plaintiffs in *Rachael Mei Ling Ong (supra)* had made an application to remove the defendant as the executor/trustee of the deceased's estate for the defendant's lack of diligence in acting his duties as the executor/trustee

of the estate. The plaintiffs submitted that the defendant had bluntly ignored the plaintiffs' wishes and refused to give the plaintiffs relevant information pertaining to the deceased's estate. His Lordship Kamalanathan Ratnam JC (as he then was) allowed the plaintiffs' relief and consequently removed the defendant from being the executor/trustee of the estate. His Lordship in delivering his judgment observed that it was clear from the deceased's will that the trust ceased upon both of the deceased's children attaining the age of majority. Therefore, since the first and second plaintiffs had already reached the ages of 29 and 25 respectively, they were allowed to hold the properties in their personal capacities without the defendant's interference.

[51] The plaintiffs' counsel argued that based on *Jigarlal Kantilal Doshi* (*supra*) and *Rachael Mei Ling Ong* (*supra*), the appointment of administrator(s) is often granted following the removal of the executor and revocation of a grant of probate. With due respect, I disagree. Nothing in *Jigarlal Kantilal Doshi* (*supra*) could indicate that courts are allowed to make any appointment for administrator without the proper application of a letter of administration when a grant of probate was revoked. The Federal Court has explicitly stated that ARB should have corrected its application pursuant to the procedures set out under O. 71 r. 37. The fact that this is a Federal Court decision clearly shows that this court is unable to ignore the procedure and requirements for the issuance of the letter of administrator and to order such relief. Likewise, there is nothing in *Rachael Mei Ling Ong* (*supra*) to suggest this. In fact, considering the different issues between this case and our present case, it is safe to say that *Rachael Mei Ling Ong* (*supra*) decision is not relevant to our present case.

[52] It is of utmost importance for the parties to differentiate the law and procedure for the grant of probate and for the letter of administration. This court cannot simply order any consequential relief and disregard the procedure. Before the application was filed, the plaintiffs had made several applications to amend their statement of claim before the application. These were all granted by this court. Yet they had never applied to insert this relief seeking to issue a new letter of administration and to appoint an administrator or follow the proper procedure for the issuance of the same thereto. This is something that this court could not order merely as consequential relief. Nevertheless, after proper explanation about the position of this court, the plaintiffs conceded to this and agreed to file in an application for a letter of administration separately after this.

Conclusion

[53] In conclusion, the answer to questions 1 and 2 are both in the affirmative. To conclude, this court thus finds that the application brought by the plaintiffs has merits. I agree with the plaintiffs' submissions that there is a conflict of interest and consequently this conflict of interest also

- A constitutes a sufficient cause as per s. 34 of the Probate and Administration Act 1959. For these reasons, judgment is hereby entered against the first defendant and this court order the following:
- (i) the grant of probate dated 28 November 2001 is hereby revoked;
- B (ii) the first defendant is removed forthwith as an executor and trustee of the estate;
- (iii) Ong Ghee Sai is to be appointed as a co-trustee of the estate; and
- (iv) costs for the action and the application is to be paid personally by the first defendant to the plaintiffs.
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